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OF THE NATURE OF AGENCY.

THAT the sphere of personality is not to be limited in even our usual and less accurate conceptions to the sphere of physical presence is becoming more and more evident with each day's advance in the arts of civilization. We now employ so many mechanisms, and they enable us to put forth our energies over such enormous distances, that we have almost ceased to be astonished at our powers. We regard these instruments as being, what in very truth they are, a mere lengthening of our limbs, extensions of the organic self, and this conception, accurate in the domain of daily common sense, is not less accurate in the domain of legal thought.[1] It is similarly true that such self-extension is by no means confined to inorganic means. Men may and do act through other men in accomplishing results, which, when accomplished, are their acts, to be attributed to them rather than to their instrumentalities.

What is meant when it is said that one person acts *through* another? The essential matter, I believe, will be found to be this: that the one conceives a purpose which he intrusts to the

[1] It has been held that even the definition of the merely physical person must include more than the body and the limbs. Marentille *v.* Oliver, 1 Penn. (N. J.) 379 (1808); s. c. Ames's Cases on Torts, 27. "An injury to the clothes on one's back is a trespass to the person, Regina *v.* Day, 1 Cox, C. C. 207. So is the removal of an ulster from the plaintiff, Geraty *v.* Stern, 30 Hun, 426; or striking a cane in the plaintiff's hand, Respublica *v.* De Longchamps, 1 Dall. 111; or cutting a rope connecting the plaintiff with his slave, State *v.* Davis, 1 Hill, S. Ca. 46." Ames's Cases on Torts, 27, n. 3. In Marentille *v.* Oliver it was held to be a battery to the person to strike a horse in the shafts of a carriage in which the plaintiff was riding. This case probably goes to the utmost verge of the law, but it would seem to be correct. The newly invented telautograph, by which a signature may, by an electric device, be duplicated at a distance in the very act of writing, illustrates the same extension of the personality. If by means of the telautograph I should write my name in Boston while actually seated in New York, the signature is as much made in Boston as if I should use a pen two hundred miles in length. But see, however, State *v.* Hall, 114 N. C. 909 (1894). In that case the defendant was indicted in North Carolina for murder. The murder was committed by shooting the deceased across the boundary line between North Carolina and Tennessee. So far as the case holds that the murder was committed in Tennessee and not in North Carolina, it would seem to be erroneous. The act is clearly a continuing act, beginning in one place and completed in another, and cannot be said to have been committed in either place alone. It would seem to have been the part of justice to hold that the defendant had rendered himself amenable to the jurisdiction of both States.

other to accomplish. In the majority of acts, the intent and the efficient energy unite in the same individual; but there is no insuperable obstacle to their separation. In fact, as civilization becomes more intricate, this sort of separation becomes more frequent; and as individual needs become more complex and less easy of satisfaction by the individual himself, action through others becomes more and more necessary, and the forms of such action become more and more complicated.

The possibility of the existence of such relations between man and man is due to the possibility of communication, the means whereby men make known to each other their various thoughts. Whatever be the form which the relations resulting from such a separation of the preconceived idea from the subsequent act may take, it depends upon this communication of ideas. The thinker, after conceiving his purpose, must state it, and the actor must accept that purpose so stated as an end to be accomplished before he can act at all. The thought so expressed on the one hand, and so agreed to be followed on the other, is the very determining element of the relation. Indeed, the relation *is* exactly what this mutual understanding is, neither more nor less. In the ethical and juridical handling of it, the mutual understanding must therefore be constantly regarded and as constantly held to be the norm of construction.

One source of difficulty in practically dealing with this mutual understanding is due to the presence in it, oftentimes, of certain vague and undetermined quantities of custom. Usual exigencies call into being usual means for their satisfaction. The needs of commerce, for example, are the occasion for numerous forms of credit capable of transmission from hand to hand and place to place. These and the like involve within broad limits substantially identical relations. Thousands of dealings are had in which the only observable differences are those of names, dates, and amounts. Thus a certain routine character attaches to them, and they fall into well defined classes. Men assume, without overt expression and often without even mental advertence to the point, that these usual elements enter into their dealings, and transactions of such a character must be interpreted with reference to them.

The nature of the question involved in their construction, however, is not thereby changed. To determine the nature of a given relation of this character, we first ask, What was the mutual

understanding of the parties? If we find present these elements of custom, we may ask further, With reference to what custom did the parties deal? which is the same thing as to ask, What custom did they incorporate into their understanding? Obviously, the last question is precisely identical with the first.

Questions of the understanding of two parties are typical questions of fact, and are usually in our jurisprudence so treated, that is to say, they are usually left to the jury for determination. When, however, these elements of custom enter, they have been frequently arrogated by the court to its own province, and then these questions are called questions of law. The process by which this was effected is plainly visible. In the times of Mansfield and Holt, when the great expansion from the old feudal narrowness into our more modern conditions first began in Anglo-Saxon law, with new and difficult cases of custom, the court not infrequently called in the aid of men familiar with such transactions. Their statements were accepted by the court; they were mentioned in judicial opinions, or included in reporters' statements of fact, and, thereby passing into the books, became precedents, and are now familiar learning.[1]

In all such cases, however, the imperative obligation of following the intention of the parties still obtains, and he who would do justice must recognize that what is called a rule of law is in such cases but a canon of construction. With this in mind, I propose to examine certain simple and typical cases which present the separation of which I have spoken, and which are not infrequently the subject of much confusion.

1. *Suppose that I convey to A certain property which I direct him thereafter to hold to certain uses prescribed by me.*

Here we find the separation of the plan from the execution of it. I have conceived certain purposes which, for various reasons, A undertakes to execute. The effective accomplishment of them is dependent upon the communication established between us.

[1] For example, the English court frequently consulted with the merchants of London with reference to the custom of merchants, then first obtaining judicial recognition. In Buller *v.* Crips, 6 Mod. 29 (1704), which was the famous case in which Chief Justice Holt undertook to decide that promissory notes were not negotiable instruments, the reporter states that "at another day, Holt, C. J., declared that he desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course." In that case, indeed, the Chief Justice declined to follow their opinion and was in consequence overruled by St. 3 & 4 Anne, c. 9, §§ 1-3 (1704).

B's duty to me and my correlative right against him are exactly defined by my instructions as made known to him by me. As so expressed, these are to hold the property ostensibly as owner, that is, by a legal title during the continuance of the relation, subject however to certain obligations to me as to management. It is a necessarily involved condition of these instructions that the property so held shall be preserved as a distinct and permanent fund.

2. *Suppose I deposit moneys in the bank, and direct the bank to disburse them upon my order.*

Again we find a purpose of one to be accomplished by the act of another, and again we find the relation determined by the instructions that are given by me to the bank. This cases differs from the previous one in that, while the bank becomes the owner of the moneys deposited with it, it is under no obligation to preserve them as a specific fund. After it receives the moneys, it owes to its depositor an equivalent sum, and its obligation is to discharge that debt by payment to such persons at such times as the depositor by written order directs.

3. *Suppose I direct A to build me a house, for which, when completed, I am to pay him a stipulated sum.*

For a third time we have the original notion conceived by one mind, and the execution of it left to another; but there are elements obviously distinguishing this case from the two last supposed. Of these the chief is that I am an obligor as well as A. My obligation, which is to pay the stipulated price, is however contingent upon two things; (1) the completion of the work, and (2) its conformity to the instructions contained in the agreement. This makes me substantially a purchaser, and that which I purchase is completed work.

4. *Suppose I direct A to take charge of my horse, for which I agree to pay a stipulated sum.*

Again I am the creator of a purpose which I intrust to another to execute. And again the duty which A assumes to me is defined by the instructions which I give him. There is also a reciprocal obligation on my part; but it is conditioned, not upon the satisfactory character of the work done, as in the last case, but upon the continuance of the labor; that is to say, so long as A remains in my employ, I am in duty bound to pay the stipulated price, commonly called wages. If I would relieve myself from my obligation, I must terminate the relation. In other words, I am a purchaser, but that which I purchase is A's service, as opposed to his completed labor.

5 *Suppose I direct A to execute in my name a deed conveying to B certain lands which I own.*

The now familiar elements of the purpose of one and the execution of it by another reappear, together with the determination of the relation between us by the communication of my purpose. As in the last case, what I receive from A is his service; but there is a new factor here, due to the presence of B. Before B accepts such a deed as and for my deed, he is entitled to be certified of the right of A to act in my stead. The relation supposed between A and myself, in other words, must be communicated to B, and until so communicated A cannot effect my purpose. The relation between A and myself is not completely established between us two alone, and is not therefore completely intelligible without the recognition of B's part in it.

These five cases which have just been considered illustrate certain forms of joint action which are very common, and of which many have been gathered under separate titles in the law. In stating them the facts have been reduced to the simplest and barest form, in order to bring out the elements common to the largest number of specific instances; and in analyzing them the common elements of the intention have been stated as briefly as possible.

The first illustration will be readily recognized as typical of the relation classified in the books under the title of trustee and *cestui que trust*, while the fourth and fifth are classified under the titles of master and servant and of principal and agent, respectively. These terms, however, are often misused in the sense that they have been applied to relations of very varying legal import. Thus, A in the first illustration has been called an agent, and in the fifth is very frequently called a trustee.[1] The second and third illustrations have not received specific names; but they illustrate respectively the relation subsisting between a bank and its depositors, and between an owner and a contractor. In all of them it is to be

[1] In Rowe *v.* Rand, 111 Ind. 206 (1887), a trustee was called an agent. So directors of a corporation are frequently called trustees, their position being in fact much more analogous to, if not indeed identical with, that of an agent as I have used the term. Cook on Stockholders, 648, and cases there cited in n. 2. See also Wilcox & Gibbs Sewing Machine Company *v.* Ewing, 141 U. S. 627 (1891), where one who had obtained from the company an exclusive right to sell their machines within a certain territory was called an agent to sell, although he bought the machines outright from the company and then sold them, keeping the purchase price and pocketing the profit or loss himself.

remembered that the classification is based upon a classification of intentions, and is therefore not an organic division, such as that into genera and species, but is rather a mechanical division, such as would be that of books classified according to the number of their pages.

It is of course immaterial what vocable we use to mark these differing relations. It is material, however, that, when once we have made a choice of words, we should thereafter confine the word chosen within the limits of accurate definition. Cases, for example, where there is a transfer of title and a preservation as an entirety of a fund should not be confounded with cases where these play no part. Let me now, therefore, for the sake of accurate discrimination, call attention in more detail to the differences between the last two cases. In the first of the two, that is, the fourth of the supposed cases, the relation between A and myself was dependent solely upon the communications which passed between us two. A became my servant just to the extent to which I gave him directions. In the second of these, that is, in the fifth of the supposed cases, we find that A's agency is inchoate and ineffectual until B has learned of the communications wherein I gave A the right to act in my behalf. It may happen that B is informed of only a part of these communications, nor is it necessary that he should know more of them than will suffice to satisfy him of A's representative character. So much, however, he should know, or else he will refuse to deal with A, and will insist upon direct communication with me, or upon none at all. It follows, therefore, that the intended relation of A to me is not complete in fact, or intelligible in thought, until there are, first, instructions communicated by me to A, and, second, a statement of those instructions made to B. This second element at once distinguishes by a wide gap, the fifth case from the fourth. The latter, being a case where only two persons are necessarily included, is an instance of a bilateral relation, while the former, where three are necessary, is an instance of a trilateral relation.[1]

[1] Professor Huffcut, in his book, the most recent treatise on agency, very nearly perceived the true nature of these relations. Thus he says: "The fundamental distinction between an agent and a servant lies in the nature of the act which each is authorized to perform. An agent represents the principal in the performance of an act resulting in a contractual obligation, or an obligation springing from contract relations. A servant represents the master in the performance of an act not resulting in contractual obligation." Huffcut on Agency, § 4 (1895).

In his subsequent illustrations in the same section, he distinctly shows that the

Professor Langdell, in a striking passage in his treatise on equity pleading, calls attention to a limitation upon the power of common law courts, as distinguished from courts of equity. He says: —

"They cannot deal with a controversy to which there are more than two parties or two sets of parties. The contract of suretyship will serve as an illustration of this. To such a contract, in its simplest form, there are three parties, viz., the creditor, the principal debtor, and the surety; and no two of them are united either in interest or obligation. No more than two of them, therefore, can be parties to any action at law. If there are several sureties the case is much worse; for though they may all be sued at law by the creditor, if their obligation be joint, yet, in any controversy with the debtor in which they are all interested, the law can afford no remedy; for only one of them can be a party to an action by or against the debtor. In other words, a court of law can only entertain a controversy between the debtor and one surety. So, if a controversy arises between the several sureties, a court of law is equally powerless, as it can only entertain a controversy between two of them." [1]

This limitation upon the power of common law courts has unfortunately delayed a proper recognition of the complex character of many relations which have come before them for determination. By reason of the presence of only two parties, such relations have been treated as bilateral, and as capable of determination without the presence of other parties, when they have been in fact trilateral, or even multilateral. It is very frequently the case that such a method of treatment is practically possible and, for the sake of convenience, justifiable; but by neglecting the parties not before them the courts have been at times misled as to the true character of the relation with which they were dealing. The famous New York case of Lawrence *v.* Fox,[2] and the controversies which have raged over it, excellently illustrate the difficul-

agency which he has in mind is one in which three persons are involved as parties, while it is otherwise in his mind with the relations of master and servant. He was misled, however, into a false classification on the basis of the difference between a contract and a tort. It will be readily seen that the source of his error was his failure to understand the relation between the principal and the third party, for all the illustrations of agency which he gives involve three persons. Thus he says: "The law governing the one belongs, therefore, to that branch of the law of obligation having to do with contracts, or torts springing from contracts, as deceit. The law governing the other belongs to that branch of the law of obligation having to do with torts generally." *Ibid.* His exception of the tort of deceit shows how close he was to the distinction between bilateral and trilateral relations.

[1] Langdell, Equity Pleading (2 ed.), § 41. [2] 20 N. Y. 268 (1869).

ties of which I speak, and yet the matter is strikingly simple. For the purpose of making my point I shall risk a charge of digression in order to analyze that case.

A gave money to B with instructions to pay it to C. In Lawrence *v.* Fox it was held that C could recover from B in an action on contract.[1]

The decision was of course wrong. It assimilated the relation between B and C to the ordinary relation between parties to a simple agreement; whereas the fact was that B had made no promise *to* C, and had received no consideration *from* him. These are the two essential elements of a contract at common law, and both were lacking. On the other hand, B, by accepting the money from A on the conditions prescribed, did create a valid obligation, consensual in its nature and running directly to C. The difficulty is to obtain recognition for it in the courts of common law. They have enforced similar consensual obligations which are not referable to any class of contracts in only two instances that I have been able to call to mind, and those two instances are cases of special actions on the custom of merchants, allowed in deference to an overwhelming commercial necessity. They are actions by the payee of a bill of exchange against the acceptor (an action by the payee of a check against the bank on which it is drawn would be substantially the same thing) and actions against an insurance company by the beneficiary of a policy of insurance other than the one who pays the premiums and takes out the insurance. Courts of equity, however, have had no difficulty in similar cases. Nothing is more common than a bill whereby the beneficiary of a trust, other than the original grantor, endeavors to enforce the trust obligation against the trustee. In these three cases there need be no promise made to the plaintiff or consideration received from him. What a court of equity can do, a court of law, so far as its limited remedial powers will permit, should have no difficulty in doing. It should allow an action by C against B for money had and received, not on the ground of unjust enrichment, but as the common law analogue of a bill against a trustee.

The doubts and obscurities associated with all these cases would have been readily avoided, if their true character had been recognized. They are cases of trilateral relations, in which the obligor

[1] The point has since been made, that in the actual transaction A was indebted to C. Though that fact is used in New York to limit the scope of Lawrence *v.* Fox, it is not now material and I have consequently neglected it.

has assumed to one of the parties an obligation of which the essence is that he should be under an obligation to the other. In Lawrence *v.* Fox, for example, B, the obligor, made a promise to A, and thereby assumed a duty to A; but the essence of that duty was that he should also be under a duty to C. It follows that, when B refused to perform his promise, he violated two rights at once. A's right should be enforced in any one of three ways, at his election: first, by a bill in equity to compel B to convey the fund to C, which is specific performance, or, as Professor Langdell somewhere more accurately calls it, specific reparation; second, by an action at law for damages for breach of contract, in which, however, the damages will be nominal; third, by an action for money had and received, in which event he would rescind the contract and recover the consideration paid, and this on the ground of unjust enrichment. C, on the other hand, should have either of two remedies, at his election: first, a bill in equity for specific reparation; second, an action for money had and received, which would be based, as I said before, not on the ground of unjust enrichment, but on the consensual obligation, and would be the legal counterpart of his bill in equity. It will be observed that he has no right, or rather power, of rescission. The rights in the case of a bill of exchange, or of an insurance policy, or of a trust, while differing in some details, are nevertheless open to the same general analysis. That these relations are really trilateral is shown by the fact that the obligation assumed by B cannot be released except with the consent of the third person. This is perhaps more evident in the case of a trust than in such a case as Lawrence *v.* Fox.

In the case of agency, the trilateral character of the relation becomes even more important than in these last cases, because the much mooted question of what constitutes an agent's authority will be found to turn on it.

Whatever else we may say about an agent's authority, it is at least coextensive with his ability legally to bind his principal. Now, in the first place, it will hardly be disputed that whatever the principal tells the *agent* he may do, will, when done, be legally valid as the principal's act. Judge Holmes, in an interesting article on agency, says that this is "plain good sense," introducing no new principle into the law and requiring no explanation.[1] In

[1] 4 Harv. L. Rev. 346, 347.

the second place, it will not be disputed that whatever the principal tells the *third person* his agent may do will, when done, be just as valid an act of the principal as the other. In this last case there may, or may not, be a technical estoppel; but the responsibility of the principal for his agent's acts is, under these circumstances, quite independent of that doctrine. It rests on precisely the same ground as that upon which is founded the doctrine of mutual assent in contracts generally. If an offeree says "Yes" to an offer, he thereby creates a valid legal obligation, and that too without reference to any action by the offeror in reliance upon his assent. It is quite common to call an authority of this kind, based upon representations made by the principal, an "apparent authority." The phrase is unfortunate. It seems to imply some defect of legal validity, when in truth there is none, since the principal is quite as unable to avoid the consequences of acts authorized after this fashion as he is to avoid the consequences of acts authorized in any other.

In every case of dealings with third persons through an agent these two elements will be found: the instructions to the agent, and the representations to the third person; and in hardly any case will these two be precisely identical.[1] It may sometimes suit the principal's purpose to endow the agent with larger powers of action than are made known to the third person. Thus, for example, the principal, when he is a purchaser, will perhaps authorize the agent to offer a higher price than he is willing to make known to the seller. On the other hand, it may sometimes be the case that the principal will inform the third person that the agent may do such and such things, which to the agent he says he may not do. Obviously in this case the principal must abide by his statements to the third person.

An illustration of this difference between the instructions to the

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[1] I use the words "representations" and "instructions" in their largest sense, which includes representation and instruction by conduct as well as by words. It is to be noted in the case of representations that they need not come to the third party directly from the principal. They may come indirectly through the agent. For example, the principal may never see the third person; but if he authorizes the agent to state the scope of the granted powers, he will be bound by such a statement. It not infrequently happens that a statement so authorized may imply a larger power than that contained in the immediate instructions to the agent, in which case the principal will be bound by the statement rather than by the instructions. The principal has in fact empowered his agent to do two things, — to do certain acts, and to make representations as to the authority conferred.

agent and the representations to third persons is presented in a series of cases in which the courts of New York have adopted a rule at variance with the rule of other leading jurisdictions of the common law. A typical case presenting this conflict is that of a shipping agent of a railroad who issues a bill of lading for goods that were not in fact received by the railroad, or of a transfer agent who issues a certificate of stock in a corporation upon a transfer of ownership without taking up the prior certificate, or of the cashier of a bank who certifies a check when there are no funds of the drawer in the bank's possession. The third person in each of these cases is assumed to be an innocent purchaser for value.

In these cases the appointment of the agent to the position of station-master, or of transfer agent, or of cashier, is in itself a representation to all persons having dealings with the corporation through such agents that they are authorized to do all things necessary to the discharge of their official duties. I cannot do better than quote in support of this statement the unanswerable argument of Mr. Justice Davis in the case of New York, New Haven & Hartford Railroad Company *v.* Schuyler[1]: —

"In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing to be within its scope and authority without, as a part of the act itself, representing expressly or by necessary implication that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation, which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it."

The difficulty of these cases arises from the undetermined elements of custom of which I have before spoken. Positions like these are very common. They carry with them certain broad, well recognized duties and powers, and those who deal with agents in such positions assume the existence of those duties and powers

[1] 34 N. Y. 30, 70 (1865).

without special inquiry, and both the principal and the person dealing with these agents, and the agents themselves, may be said to incorporate in their transactions these elements of custom. Consequently, to appoint an agent to one of these positions is in fact to hold him out to the world as having certain powers, although their exercise under certain conditions may constitute a breach of the relation between the agent and the principal. The public are, in fact, informed that the agent may make statements as to the existence of the goods named in the bill of lading, or of the stock purporting to be contained in a stock certificate, or as to the amount on deposit to the credit of a drawer; and yet, as between the agent and the corporation in these cases, it is clearly a breach of duty for the agent to make any representation except in strict accordance with the fact. This is a case, therefore, in which the representation to the third person of the agent's authority may exceed in purview the instructions to the agent.

In the case just considered, the New York Court of Appeals has grasped the situation with a finer sense of justice than the courts of some other jurisdictions. It has embodied its rule in such cases in this phraseology, to quote the language of Judge Finch[1]: —

"It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. . . . A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability."

The New York rule has not been adopted in the other leading jurisdictions.[2] The courts of England, Massachusetts, and the United States Supreme Court have confined themselves to a limited definition of the word "authority," that is, in effect, they

[1] Bank of Batavia *v.* N. Y. &c. R. R. Co., 106 N. Y. 195, 199 (1887).

[2] Grant *v.* Norway, 10 C. B. 665 (1851); Pollard *v.* Vinton, 105 U. S. 7 (1881); Friedlander *v.* Texas &c. R. R., 130 U. S. 416 (1889); Mussey *v.* Eagle Bank, 9 Met. 306 (1845).

define it as the instructions by the principal to the agent, neglecting the fact that the principal may put it out of his power to have recourse to these by reason of his representations to others. If the views herein contended for are correct, it will be seen that the New York rule, while not strictly accurate in its expression, conforms nevertheless more truly than the other to the trilateral character of the relation, and is therefore more consonant with justice.

It is often said that the law of agency depends upon a fiction. Judge Holmes, in the article to which I have previously referred,[1] endeavors at great length to establish this proposition. His difficulty is this: while he admits the "plain good sense" of holding the principal responsible for "commanded acts," by which it is clear that he means acts dependent upon direct instructions of the principal to the agent, he cannot understand a responsibility for acts not so commanded. He therefore relegates all such responsibility to a fiction of "identity" between the principal and agent, for which he strives to account historically as a survival of the old doctrines as to the *patria potestas*, and the merging of individual identity in that of the *familia*. So far as it works practical justice, he would retain this fiction; but he conceives that it has been carried to excessive lengths in actual decision.

His theory is open to several criticisms. In the first place, it is quite doubtful whether he has successfully established any connection between the doctrines as to *patria potestas* and our common law. The former are natives of Rome, and it may be questioned whether they were ever domiciled in England. His argument on that point is far from convincing. In the second place, it is the veriest abdication of our reason to base a rule of law on a fiction, trusting it to work practical justice, and to stop there. His obvious duty was to ascertain a theory and standard of practical justice, and then discard the fiction. Without such an extrinsic standard what limit can he put on its operation? In the third place, and this is the fundamental criticism, he fails to recognize that the principal by his representations to others may render himself accountable to them for acts not commanded, or even for acts which, as between himself and his agent, he has forbidden. Such a liability is as plain good sense as that for commanded acts, and will explain many of

[1] 4 Harv. L. Rev. 345, continued in 5 *ibid.* 1. See also an article, "Why is a Master liable for the Tort of his Servant?" by Frank W. Hackett, 7 Harv. L. Rev. 107.

the cases for which the learned writer failed to find an intelligible theory. Judge Holmes seems to have been also confused by cases of adjudicated liability not properly falling within the categories either of commanded acts or of acts represented to be commanded. These cases, however, are justifiable on no theory at all. They rest, not upon fiction, but upon injustice and departure from the real relations, and no explanation of them is required, or even possible.

I hold the fact to be that whenever a man conceives a purpose and procures its accomplishment ostensibly as his act, whether by machine or by another individuality, the act so done is his act in every legitimate and truthful sense, and that a resort to a fiction to sustain a legal responsibility for it is quite unnecessary.

In conclusion, it is to be added that one great object of this article will be effected, if I have made clear, in addition to some difficulties of my strict subject matter, the fact that legal relations may be extremely complicated, that they cannot be successfully handled without taking into view all the persons between whom the relations subsist and all the relations subsisting between those persons, and that just as there are bilateral relations, so there may be trilateral, quadrilateral, or even multilateral, relations. As the restrictions of ancient procedure are swept away, we should find less difficulty in dealing with these complications, and a more systematic understanding of them than has ever existed in the past should be the portion of the future.

Everett V. Abbot.

NEW YORK, February 4, 1896.